

LETTER OPINION
96-L-147

August 30, 1996

R. Jon Fitzner
City Attorney of Valley City
PO Box 330
Valley City, ND 58072

Dear Mr. Fitzner:

Thank you for your letter requesting my opinion on whether a home rule city may participate in an "Even Dollars" program to provide funds for the use of a private nursing home. Under the "Even Dollars" program, the monthly city utility bill of customers choosing to participate would be rounded up to the next whole dollar amount, with the extra payments going to a private nursing home. The city's involvement in the program would be collecting the donated funds through its Public Works Department and depositing the collected funds in an account controlled by the board of directors of the private nursing home. Thus, some city time and resources would be used in administering the program, but the city would make no direct financial contribution. The private nursing home will use the money in the fund for resident equipment, wall hangings in residents' rooms, facility remodeling, wallpaper, painting, carpeting, furniture, and, if possible, transportation.

Article X, Section 18 of the North Dakota Constitution provides, in part, as follows:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

Article X, Section 18 does not define "donation." The term, therefore, must be understood in its ordinary sense. See N.D.C.C. § 1-02-02. As generally understood, making a donation is the "act of giving something to a fund or cause." The American Heritage Dictionary 417 (2d coll. ed. 1991). The item given as a donation could include money, items of monetary value, time, the use of equipment and resources, or other contributions. Participation in the "Even Dollars" program would require the use of some of the Public Works Department's time and equipment. The time and equipment

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would be used to benefit a private entity without compensation. Thus, it is my opinion that the city will be making a donation to the private entity if it participates in the "Even Dollar" program, even though such donation of time and equipment use is probably minimal.

The North Dakota Supreme Court has stated that the predecessor provision to Article X, Section 18 of the North Dakota Constitution:

does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city "otherwise" to make loans or give its credit or make donations. In other words, making loans or giving credit [or making donations] may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise.

Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964) (emphasis added). Thus, it is necessary to determine the extent to which Valley City is permitted to engage in an industry, enterprise, or business. Valley City is a home rule city. N.D.C.C. chapter 40-05.1 provides for home rule authority in cities. Under this chapter, a city may enact ordinances in matters of local concern that fall within the powers enumerated in N.D.C.C. § 40-05.1-06 if such powers are included in the city's home rule charter.

A home rule city may be authorized in its home rule charter to "engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute." N.D.C.C. § 40-05.1-06(10). If a home rule city wants to engage in an enterprise not authorized by statute, it must have such authorization in its charter, and the proposed enterprise must be implemented through an ordinance. N.D.C.C. Secs. 40-05.1-06, 40-05.1-06(10).

1993 N.D. Op. Att'y Gen. 40. Valley City's home rule charter authorizes the city to "engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute. . . ." City of Valley City, N.D., Home Rule Charter, art. 3, sect. 2.j. (1991). No statute prohibits a home rule city from creating an enterprise through which the city could participate in a program to provide funds for the use of a private nursing home.

It is necessary to determine whether participating in a program to provide funds for the use of a private nursing home constitutes an enterprise. See 1993 N.D. Op. Att'y Gen. 40. "[T]he term

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'enterprise' means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk." Id. at 42. It is my opinion that participating in a program to provide funds for the use of a private nursing home is of some scope and, therefore, constitutes an enterprise. However:

a city may not engage in an enterprise unless it is for a public purpose. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); Green v. Frazier, 176 N.W. 11 (N.D. 1920); 1992 N.D. Op. Att'y Gen. 57. An ordinance permitting a home rule city to engage in a particular enterprise must provide for supervisory controls to ensure that the public purpose is met. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965).

Finally, the implementing ordinance must be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise, Litten v. City of Fargo, 294 N.W.2d 628, 634 (N.D. 1980).

1993 N.D. Op. Att'y Gen. 40, 42. Thus, it is my opinion that a home rule city whose home rule charter authorizes it to enter into enterprises may engage in an enterprise whereby the city participates in a program to provide funds for the use of a private nursing home if the implementing ordinance: "(1) authorizes the city to engage in the proposed enterprise, (2) provides assurance that the activity has a public purpose, (3) sufficiently details the manner of implementing the activity, and (4) provides for supervisory controls to ensure the public purpose is met." 1993 N.D. Op. Att'y Gen. 40, 42-43.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dab/las/jrs